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IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

Nos. 823, 824, 825.

FRED E. HUMMEL, AS TRUSTEE IN BANKRUPTCY OF THE ESTATE OF DOROTHEA W. HUSZAGH,
Petitioner,

vs.

JAMES R. CARDWELL, DOROTHEA W. HUSZAGH AND FRED J. WEGG AS THE SOLE TRUSTEE UNDER THE LAST WILL AND TESTAMENT OF FREDERICK H. WICKETT, DECEASED,
Respondents.

REPLY OF PETITIONER.

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REPLY OF PETITIONER.

A simple prefatory restatement will help this Reply dispel confused reasoning rampant in Respondents' Answers: the proceedings brought by the Trustee in Bankruptcy, seek, by a Bill of Review, to have declared void a decree entered in creditor's bill proceedings brought by Cardwell, a judgment creditor of the bankrupt. The ultimate question is whether that decree in the Cardwell creditor's bill proceedings should be set aside as void. The Trustee in Bankruptcy, Petitioner here, is not seeking to seize this trust by means of a creditor's bill. He is not plaintiff in any creditor's bill proceedings.

I.

Those Portions of the Decision Below Which Are Based Upon Questions of Fact and of State Law Have No Application to the Bill of Review of This Petitioner. The Decision as to This Petitioner Was Based Entirely on the State Court's Erroneous Interpretation of the Federal Bankruptcy Act.

The chief defense offered by respondents is that the Illinois Supreme Court decided a question of *fact*, to which it applied a *state* rule of law. They contend the *facts* established a consent decree, which under the *state* law doctrine of estoppel could not be set aside on collateral attack.

All of the above is true, *but only as to the counterclaim of Dorothea W. Huszagh.* It is not true as to the Bill of Review of the Trustee in Bankruptcy, for as to him, the decision of the Illinois Supreme Court was adverse to his Bill of Review solely because of the interpretation placed by the State Court upon the Bankruptcy Act.

It is peculiar, we admit, for a decision to differentiate between two parties, each ostensibly seeking to attack collaterally the same decree, but that is the undeniable fact here. The reason is simple: the Bill of Review of the Trustee in Bankruptcy was one collateral attack; the counterclaim of the Bankrupt was a *different* collateral attack.

The Huszagh collateral attack (by counterclaim) questioned non-jurisdictional errors in the attacked decree, and such non-jurisdictional errors could be, and the court below held were on the facts, waived by consent of the parties.

The Hummel collateral attack (by Bill of Review) raised

the question of the jurisdiction of the very subject matter, and such lack of jurisdiction of the subject matter can not be waived by consent of the parties. The issues of fact of consent, and of state law estoppel, were therefore, immaterial to, and were in fact not even discussed in the portion of the decision which rules against the Bill of Review of Hummel.

The Bankrupt could have attacked the original creditor's bill proceedings on the same grounds as did her Trustee. But she never did. Her case throughout, and again in this Court, is contrary to, and never in agreement with, the case of her Trustee. It is not debated she could file such proceedings as her counsel thought best. But let us recognize the different cases, the different issues, and not seek to prevent this Court's ruling on the case presented by the Trustee in Bankruptcy, by urging there was no Federal question involved. That is true only as to the separate and wholly dissimilar counterclaim of Dorothea W. Huszagh—*a different suit.*

The collateral attack of the Trustee in Bankruptcy went to the very jurisdiction of the court to render the attacked decree: since the statute on Creditor's Bills in Illinois said a decree could not be entered selling a trust such as this, the court in the Creditor's Bill suit did not have jurisdiction to enter the particular judgment ordering sale that it did enter. With this the Supreme Court of Illinois agreed, saying (R. 130):

> "We agree with the statement of the trustee in bankruptcy that the interest of Dorothea W. Huszagh in the trust was not an estate on which a judgment at law would be a lien. We do not believe such interest could be reached by a creditor's bill, or that a creditor could acquire any lien. The trust created in the will may well be described as an active trust and comes squarely under the provisions of the exception in said

> section 49 * * * We agree further with the statement of appellee (trustee in bankruptcy) that one of the essentials of a valid judgment is that the court have jurisdiction to render that particular judgment. (*Armstrong* v. *Obucino,* 300 Ill. 140; *People ex rel. Carlstrom* v. *Shurtleff,* 355 Ill. 210; *Thayer* v. *Village of Downers Grove,* 369 Ill. 334.)"

It is unquestioned in Illinois that where a court does not have jurisdiction of the subject matter to enter a particular judgment, consent of parties cannot give jurisdiction, nor can estoppel from their actions be a defense. In the *Thayer* case, cited just above in the quoted portion of the Illinois Courts' decision here, the court said:

> "Where the court entering the judgment has exceeded its jurisdiction and such judgment or decree transcends the statute conferring jurisdiction on the court, such judgment or decree is void. * * * It is a rule well established that a void judgment or decree may be vacated at any time and the doctrines of laches and estoppel do not apply."

In *Mansfield* v. *Mansfield,* 203 Ill. 92, 98 the obvious is stated: "consent can never give jurisdiction of the subject matter." Treating the agreement of Huszagh and Cardwell as a waiver of errors, such waiver is of no effect where "the trial court lacked jurisdiction to enter the order." (*Toman* v. *Park Castles Bldg. Corp.,* 375 Ill. 293.'

The opinion below does not mention "consent" and "estoppel" in passing on the collateral attack made by Hummel. Respondents *read into* the decision what does not exist. They say Hummel was really defeated by state questions of fact of agreement; and of resulting estoppel or waiver, although presuming such a basis of decision against Hummel not only contradicts the record, but also assumes that the Illinois court held in this case that the doctrine of

estoppel applies to cure a jurisdictional defect. Such an assumption is intolerable in view of the fact that in agreeing with the Trustee's contention that the court did not have jurisdiction the court cited *Thayer* v. *Village of Downers Grove,* 369 Ill. 334, which says that where jurisdiction is lacking the doctrine of estoppel does not apply.

The decision below actually considers the facts as to consent and the legal effect of "consent" and "estoppel" to the issues on the non-jurisdictional collateral attack of Mrs. Huszagh.

The attack made by Dorothea W. Huszagh in her counterclaim is summarized here in her Brief, at page 7:

> "The cross-complaint for review of Mrs. Huszagh, seeking to set aside the decrees in the creditor's bill suit, was predicated (Rec. 43) upon the theory that her interest in the active trust estate created by the last will of her late father for her support and benefit was a spendthrift trust, and being a spendthrift trust Mrs. Huszagh could make no agreement relating to her interest which would operate as a transfer of her interest to Cardwell."

The Supreme Court of Illinois analyzed her counterclaim as follows:

> "Dorothea W. Huszagh maintains that the trust created in her father's will is a spendthrift trust; * * *"

The power of a Chancery Court to construe a will, and decide whether it created a spendthrift trust, is not, in Illinois, restricted by statute. A decision that a trust is not a spendthrift trust contravenes no jurisdictional statute. That question of whether this was or was not a spendthrift trust was specifically raised in the pleadings in the original creditor's bill, and as the Supreme Court of Illinois said as to that question:

> "The circuit court of Lake county, sitting as a court of equity, had full power to pass upon all questions arising on the pleadings in the creditor's suit

> • • • The trial court had full jurisdiction to pass upon all of the questions at issue in that case, including the controversy as to whether or not the will of Frederick H. Wickett *created a spendthrift trust. Dorothea W. Huszagh* is now estopped from litigating *those questions* again in the bill of review case." (Italics ours.)

Where the question is non-jurisdictional, inquiry into the actions of the parties is proper. If those actions amount to consent, waiver or estoppel, a collateral attack may properly be barred. The Illinois Court, in passing on the counterclaim of Dorothea W. Huszagh, did bar her on those questions of fact and of state law.

Respondents' insistence that if the bankrupt is barred, her Trustee is barred, forgets that the bankrupt was barred on the issues she raised in her suit: those issues were foredoomed to failure. Had she raised the issues her trustee in his capacity raised, then, and only then, would they equally stand or fall. It is like several counts in a complaint: some may fail, while others not susceptible to the same defenses are sustained. The question under this point is not whether Mrs. Huszagh and her Trustee have equally lost, it is whether they lost for the same reasons. Petitioner contends the fact is that the decision below did not apply those state questions to Petitioner's Bill of Review. The attempt of Respondents' Answers to change these facts is seriously a disservice to this Court. Anticipating these tactics (and not through error) Petitioner printed the Appellate Court opinion as an Appendix so this Court could see that both the Appellate and Supreme Court agreed that the consent and estoppel questions applied only to the counterclaim, not to the Bill of Review.

An analysis of the Illinois decision in this case, published in the Illinois Bar Association Journal for February 1946, is attached hereto as an Appendix. The

analysis in that learned and impartial law magazine is clearly that the Illinois Court decided the Bill of Review of the Trustee solely on the Federal question. The authors say:

> "However, it would appear that the basis of the decision *is in fact the court's interpretation of the Bankruptcy Act* to the effect that where a judgment creditor is denied the right of satisfaction of execution on property held in trust for the bankrupt or, in other words, where such property is not subject to levy and sale under judicial process, it does not pass to the trustee in bankruptcy, no consideration being given to whether the property was or was not subject to voluntary alienation by the bankrupt. This view is not supported by either the terms of the Bankruptcy Act or the cases in question."

II.

The Question of This Trustee in Bankruptcy's Title Was Decided Below Not on an Interpretation of a State Statute, But on an Interpretation of the Federal Bankruptcy Act, So a Clear Federal Question Was Involved.

Respondents argue the decision against the Trustee in Bankruptcy can be said to be no more than a state court decision construing Section 49 of the Illinois Chancery Act. But the real point is: the Illinois court *construed the Bankruptcy Act* as limiting a Trustee's rights to those of a judgment creditor. Only by so construing the Bankruptcy Act, only by lowering the level of a trustee in Bankruptcy's rights to those of a judgment creditor, did the Illinois Supreme Court even have occasion to discuss a judgment creditor's rights under Section 49 of the Illinois Chancery Act. If the Illinois Court had recognized the rights of the Trustee to property which by its nature is assignable (Section 70 (a) 5) the question of a judgment

creditor's rights under Section 49 to bring a creditor's bill in equity to satisfy a judgment would never have arisen.

As pointed out in our Petition (p. 14) Section 49 does not prohibit assignment, and this trust is assignable. All of Respondent's Answers admit it is assignable. Only by refusing to recognize the Trustee's title to that which is assignable did the Illinois Court defeat this Petitioner.

It should be also remembered, the Trustee in Bankruptcy has no intention of ever filing a Creditor's Bill. Mrs. Huszagh's interest in this trust is scheduled in Bankruptcy. A claim for its exemption is pending. An action to "quiet title" in the Trustee would not be a Creditor's Bill, seeking a judgment (contrary to Section 49) that the trust be offered at public venue by a Master in Chancery for sale to the public. Such a plenary suit in no way would involve the statute on practice on Creditor's Bills in Illinois. Here might be noted the repeated misstatements of respondents that Section 49 of the Chancery Act prohibits any method of reaching a trust. Section 49 is expressly limited to Creditor's Bills, and the practice thereon. The common law rule as to creditor's bills always was that no jurisdiction existed in equity to entertain a creditor's bill to reach a trust which was not set up by the debtor himself. (*Hardenburgh* v. *Blair,* 30 N. J. Equity 645 contains a learned study.) Section 49 of the Illinois Chancery Act was passed solely for the purpose of "giving effect to the common law" the Illinois Supreme Court said in *Knight* v. *Gregory,* 389 Ill. 554, 60 N. E. (2d) 399, 401.

The Trustee brought a special and a limited action to knock out for invalidity a sale made contrary to a statute. He was defeated because the Illinois Court construed the Bankruptcy Act as giving only the rights of a judgment creditor. That is the only reason Section 49 of the Chan-

cery Act (which relates to an action by a judgment creditor) could even be thought to apply to this Petitioner. Whether Section 49 ever would apply to Petitioner should logically await filing of a creditor's bill by Petitioner, a thing he has never contemplated doing.

The decision sought to be reviewed is entirely based on a wrong interpretation of the Federal Bankruptcy Act. It is a Federal question of moment suitable for settlement by this Court.

III.

Section 49 of Chapter 22 (Chancery) Illinois Statutes Does Not Protect This Trust From a Trustee in Bankruptcy.

Respondents argue Section 49 of the Illinois Chancery Act makes this trust interest "immune" from a Trustee in Bankruptcy. Huszagh's counsel, especially, says contradictorily that the Illinois Supreme Court in this case said it was "immune" (pages 17, 18) and then admits at page 20 that "the question of the immunity of Mrs. Huszagh's interest was not before the state Supreme Court for its determination. * * *"

It could only be "immune" from the trustee in bankruptcy for one of these two reasons:

1. It is exempt property; or
2. There is no method by which the trustee can reach it.

It is not "exempt" by state law, because there has been a construction of this state statute by the Illinois Supreme Court itself, as recently as March 21, 1945, in *Knight* v. *Gregory,* 389 Ill. 554, 60 N. E. (2d) 399, 401, where the court expressly held:

> "Section 49 of the Chancery Act, in our opinion, is not an exemption statute."

That leaves only the second "immunity": there is no method by which the trustee can reach the property. That highlights and underscores exactly what the Illinois Supreme Court did here: it considered the Bankruptcy Act, and conceded that:

> "The office of trustee in bankruptcy is created by the Bankruptcy Act, and *his powers and the remedies he is authorized to pursue* in a plenary suit are defined *in such act.* (Italics ours.)

Then the Illinois Court considered the Bankruptcy Act, and ruled that Section 70(c) of the Act diminished the title taken by 70(a)(5) of the Act, and that:

> "* * * the trustee in bankruptcy is vested with all the rights, remedies and powers of a judgment creditor, and no more."

The Illinois Court then held that if a judgment creditor brought a creditor's bill, he would be defeated by Section 49 of the Chancery Act, and therefore, so would a Trustee in Bankruptcy *if he brought a creditor's bill.* How completely the Illinois Court misconstrued the Bankruptcy Act is obvious from the fact it could not conceive the Bankruptcy Act as allowing a Trustee in Bankruptcy any remedies except those available to a state judgment creditor. That stresses the gist of this Petition: a precedent is set which lowers to the level of a judgment creditor's rights the entire administration of bankruptcy.

The Illinois Court holds a trustee can succeed only if the property was liable to seizure, in spite of the plain language of Section 70(a)(5) that a trustee can take:

> "property * * * which prior to the filing of the petition he could by any means have transferred, or which might have been levied upon and sold under judicial process against him, or otherwise seized, impounded or sequestered."

It is respectfully submitted therefore, that the Illinois

Court reached its decision of "immunity" only by holding there was no way the Trustee could reach this property; that his remedies to reach the property were conceded to be as set out in the Bankruptcy Act; that the decision that there was no remedy by which he could reach the property was necessarily arrived at by construction of the Bankruptcy Act; and this is the Federal question which is the heart of this Petition for Certiorari.

We believe the decision on the merits of the Federal Question wrong, and of sufficient importance for review, because if the Illinois Court is right, then not only as to trusts, but as to all property, we may properly ask why have bankruptcy administration at all, since just as much can be accomplished in state court proceedings by a judgment creditor?

It is noteworthy that every respondent avoids a defense of the Illinois Court's construction of the Bankruptcy Act, by saying it was merely "dicta." Unbiased legal opinion, however, believes the Federal Question to be the heart of the decision against this Petitioner, and that it was wrong to the extent of wholly upsetting those rules upon which, heretofore, the administration of the bankruptcy law has been based. (See comment on this case in Illinois State Bar Association Journal, February, 1946, printed as an Appendix hereto.)

IV.

The Running of Four Months Between the Judicial Sale and Filing of Bankruptcy Is Immaterial on This Petition.

Respondents state that Mrs. Huszagh had transferred her rights more than four months prior to bankruptcy. If so, she did it only by the mechanics of the decree, and sale

at public vendue by the Master in Chancery, in the Cardwell creditor's bill proceedings. If that judicial act is void when attacked by the Trustee's Bill of Review, there was in fact no transfer "four months", or any time, prior to bankruptcy. She went into bankruptcy with that asset, if the judicial seizure was void. We contend the creditor's bill was wholly ineffective as a valid transfer, when attacked on the grounds raised by the Trustee. The Illinois Supreme Court agrees, saying:

> "We agree with the statement of the trustee in bankruptcy that the interest of Dorothea W. Huszagh in the trust was not an estate on which a judgment at law would be a lien. We do not believe that such interest could be reached by a creditor's bill or that, through a creditor's bill, a creditor could acquire any lien."

In a similar case, this Court held in *Potter* v. *Couch,* 141 U. S. 296, 320, that the prior seizure "did not give any lien or title to his creditors."

Freeman on Judgments, Section 322, says that a void judgment

> "has been characterized as a dead limb upon the judicial tree, which may be chopped off at any time, capable of bearing no fruit to plaintiff. * * *"

It is submitted that if the Cardwell decree contravenes the statute (as the Illinois Court holds here) it cannot be said to have been effectual to make a transfer "four months" before bankruptcy. On this Petition, we may therefore disregard any consideration of the "four months" rule.

Conclusion.

The Illinois court had before it a Bill of Review. The Bill collaterally attacked a prior seizure of bankrupt's property. Should the attack stand, or fall, was the question. The Illinois Courts conceded the decree attacked was void. Why shouldn't it fall? Because the Bankruptcy Act only gives the Trustee in Bankruptcy a judgment creditor's rights, the Illinois Court said.

Glaring from that conclusion of the Illinois Court are three points which, we respectfully submit, show the propriety and wisdom of granting certiorari here:

1. The decision is based on a construction of the rights, powers and remedies of the Trustee in Bankruptcy under the Bankruptcy Act.
2. The Bankruptcy Act has been erroneously construed.
3. A construction of the sections relating to the Trustee's rights, powers and remedies over the bankrupt's property, which reduces him to the status of a judgment creditor, the status he occupied prior to the intentional statutory change in the Act of 1898, unsettles entirely the bankruptcy administration in this country.

The precedent of the Illinois Court, if allowed to go unchallenged by this court once the opportunity to review is thus presented, will surely be followed. If followed, bankruptcy administration will be reduced to a feeble arm of the strength, in varying states, equal to the strength of judgment creditor's rights in the various states. A bankrupt corporation having identical (and of course non-exempt) assets in various states will find those assets come within bankruptcy administration from some states, but not from others where a judgment creditor's rights differ. This shrinks the scope of what Congress has said *shall be ad-*

ministered, without regard to whether it can by state law be seized or not. More important, it violates the Constitutional requirement (Article I, Sec. 8) that Congress "establish * * * uniform laws on the subject of bankruptcies throughout the United States."

To protect the value and uniformity of bankruptcy administration, it is respectfully urged that the prayer of the Petitions be granted.

Respectfully submitted,

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Attorney for Petitioner.